

STAR LAKE RAILROAD CO.

IBLA 88-505

Decided November 13, 1994

Appeal from a decision of the Albuquerque, New Mexico, District Office, Bureau of Land Management, transferring administration of a portion of Federal right-of-way NM-29324 to the Navajo Tribe of Indians.

Set aside and remanded.

1. Conveyances: Interest Conveyed--Conveyances: Reservations--Federal Land Policy and Management Act of 1976: Conveyances--Federal Land Policy and Management Act of 1976: Rights-of-Way--Indians: Lands: Rights-of-Way--Indians: Lands: Trust Patent--Patents of Public Lands: Reservations--Patents of Public Lands: Suits To Cancel--Public Lands: Disposals Of: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Where BLM patents land to the Navajo Tribe of Indians pursuant to sec. 11(a) of the Act of Dec. 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), subject to a right-of-way grant, without considering whether to retain administration of that right-of-way pursuant to sec. 506 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1768 (1988), a subsequent BLM decision notifying the grantee of the transfer of administration to the Tribe will be set aside and the case will be remanded to BLM where the record fails to show that BLM considered whether retaining administration over the right-of-way would serve the public interest.

APPEARANCES: Jerome C. Muys, Esq., and Thomas W. Wilcox, Esq., Washington, D.C., and Jeffrey T. Williams, Esq., Santa Fe Southern Pacific Corporation, Chicago, Illinois, for appellant; Anthony Aguirre, Esq., Window Rock, Arizona, for the Navajo Tribe; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Star Lake Railroad Company (Star Lake) 1/ has appealed from a decision of the Albuquerque, New Mexico, District Office, Bureau of Land Management (BLM), dated May 18, 1988, transferring jurisdiction over a portion of its railroad right-of-way, NM-29324, from BLM to the Navajo Tribe of Indians (Tribe) because the underlying land had earlier been patented to the Tribe.

On December 5, 1979, BLM issued a 20-year right-of-way grant to Star Lake for the construction and operation of a 12.29-mile-long railroad on "public lands and reservations" in McKinley and San Juan Counties, New Mexico, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1988). The record indicates that BLM's right-of-way grant encompassed part of a planned 114-mile-long railroad, which was designed as a spur line branching off of the main line of the Santa Fe Railroad to carry coal from proposed mines in the San Juan Basin in northwestern New Mexico. In addition to public lands

1/ Star Lake is a subsidiary of the Atchison, Topeka, and Santa Fe Railway Company (Santa Fe).

and reservations, the spur line would cross Indian lands, both those lands held in trust for the Tribe and those allotted to individual Indians. The grant provided that construction of the railroad could not begin under the grant until BLM issued a notice to proceed, and that such a notice would not be issued until a right-of-way had been granted across Indian lands.

Despite negotiations with the Tribe and individual Indian allottees and various administrative and judicial proceedings, as of May 1988, Star Lake had been unable to begin construction of the railroad under the right-of-way grant. Consequently, BLM granted Star Lake one 5-year extension of its initial 5-year period to allow it to submit proof of construction under the grant. See 43 U.S.C. § 1766 (1988).

On July 22, 1986, BLM issued a decision (later published in the Federal Register on July 31, 1986 (51 FR 27467)), providing that, pursuant to section 11(a) of the Act of December 22, 1974, as amended, 25 U.S.C. § 640d-10(a) (1988), it had determined that 34,593.68 acres of public lands qualified for selection by the Tribe and could be conveyed to the Tribe and held as part of the Navajo Reservation. 2/ The affected lands included all of secs. 23 and 24, T. 23 N., R. 13 W., New Mexico Principal Meridian, in McKinley and San Juan Counties, New Mexico. BLM's decision stated that

those sections could not be conveyed until revocation of a withdrawal previously effected by Public Land Order No. (PLO) 6525 (49 FR 8250 (Mar. 6, _____)).
2/ Section 11(a) of the Act of Dec. 22, 1974, as amended, "authorized and directed" the Secretary of the Interior to transfer not to exceed 250,000 acres under BLM's jurisdiction to the Tribe. 25 U.S.C. § 640d-10(a) (1988). For the sake of simplicity, we shall refer to the Act of Dec. 22, 1974, as amended, as "the Act of Dec. 22, 1974."

1984)). The decision stated that all of the identified land would "be conveyed subject to prior existing rights including * * * rights-of-way." 51 FR 27468 (July 31, 1986).

On September 15, 1987, evidently following revocation of the PLO 6525 withdrawal, the United States issued patent No. 30-87-0085, conveying 3,115.28 acres in trust for the Tribe. Among the patented lands was a portion of the land encompassed by Star Lake's right-of-way grant (NM-29324), to-wit, the N $\frac{1}{2}$ S $\frac{1}{2}$ of sec. 23 and the S $\frac{1}{2}$ N $\frac{1}{2}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$, and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 24. Patenting of these lands affected a 2.104-mile segment of the planned railroad. The patent expressly provided that it was "subject to" several prior existing rights-of-way, including "New Mexico 29324 (PART)." The patent was silent as to the disposition of the right of the United States to enforce the terms and conditions of the rights-of-way.

In its May 18, 1988, decision, which was directed to Star Lake, BLM stated that "[t]his document is to inform the right-of-way holder and the new land owner that jurisdiction of a portion of right-of-way NM 29324 is hereby transferred to the Navajo Tribe of Indians as a result of Patent Document No. 30-87-0085," to-wit, those portions of secs. 23 and 24 that had been patented to the Tribe. BLM explained that it henceforth would not administer the right-of-way and, specifically, would not collect rentals or approve renewals, amendments, relinquishments, or assignments. Instead, BLM advised that Star Lake should negotiate these questions with the Tribe. The May 1988 BLM decision reflects that a copy of the decision

was mailed to Star Lake and the Tribe. On June 20, 1988, Star Lake timely appealed from the decision. ^{3/}

In order to have standing to appeal, an appellant must be a "party to [the] case" and "adversely affected" by the BLM decision being appealed, in accordance with 43 CFR 4.410(a). See In Re Pacific Coast Molybdenum Co., 68 IBLA 325, 331-33 (1982). There is no question that Star Lake is a party to the present case, as it involves the transfer of administration over Star Lake's right-of-way to the Tribe. See Edwin H. Marston, 103 IBLA 40, 42 (1988). BLM expressly recognized Star Lake as such by directing its May 1988 decision to it. Moreover, Star Lake is adversely affected by transfer of administration of its right-of-way to the Tribe under the supervision of the Bureau of Indian Affairs (BIA). Such transfer determines which entities will have the final authority with regard to such matters as setting rental rates and deciding whether to renew or cancel the right-of-way. We have previously accorded standing to the holder of a right-of-way to challenge BLM's transfer or waiver of administration over the right-of-way even though the conveyance of the underlying land was made subject to the right-of-way. See City of Las Cruces, 105 IBLA 50 (1988); State of Alaska, 86 IBLA 268 _____

^{3/} By order dated Dec. 14, 1990, we denied BLM's motion to dismiss the appeal as untimely and for failure to serve the Tribe with appeal documents. This order incorrectly implied that the time for appealing commenced upon Star Lake's receipt of notice of issuance of the patent. We agree with Star Lake that patenting the land did not effect a transfer of jurisdiction to the Tribe, and that the transfer did not occur until issuance of the May 1988 decision presently under appeal. Star Lake was not adversely affected as to its interest in the right-of-way until issuance of that decision and only then had the right to appeal to the Board. Thus, its appeal was timely.

(1985). Accordingly, we conclude that Star Lake has standing to pursue the instant appeal.

We reject the Tribe's arguments to the contrary. It notes that we previously held in State of Alaska, supra, that the transfer of jurisdiction over a right-of-way does not deprive the right-of-way holder of the "complete enjoyment of all rights, privileges, and benefits granted to him." It argues that this holding indicates that Star Lake has not been injured by BLM's decision. However, State of Alaska, supra, concerned whether a transfer comported with specific language of section 14(g) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1613(g) (1988), which provided that a conveyance patent had to contain provisions making it subject to the right-of-way holder's right "to the complete enjoyment of all rights, privileges, and benefits thereby granted to him." This is a different question than that presented here, which is whether Star Lake is "adversely affected" under 43 CFR 4.410(a) by the decision to transfer. The Board concluded that the transfer of administration did not in that case impair or diminish the right-of-way holder's "complete enjoyment" of its right-of-way, so that there was no violation of ANCSA. Significantly, however, the Board did not dismiss the State's appeal for lack of standing. Thus, it implicitly concluded that, although it was not deprived of its "complete enjoyment" as that term was used in ANCSA, the State was nevertheless "adversely affected" by the transfer, such that it enjoyed standing to appeal to the Board. Star Lake also has standing to appeal.

[1] Star Lake contends that BLM improperly transferred administration over the subject right-of-way without considering whether retention

of administration was necessary in the public interest, in violation of its duty under section 508 of FLPMA, 43 U.S.C § 1768 (1988). BLM argues that this section does not govern, and that, as a matter of law, it was required to waive administration of the right-of-way.

Section 508 of FLPMA provides:

If under applicable law the Secretary [of the Interior] * * * decides to transfer out of Federal ownership any lands covered * * * by a right-of-way, * * * the lands may be conveyed subject to the right-of-way; however, if the Secretary * * * determines that retention of Federal control over the right-of-way is necessary to assure that the purposes of [Title V of FLPMA] will be carried out, the terms and conditions of the right-of-way complied with, or the lands protected, he shall (a) reserve to the United States that portion of the lands which lies within the boundaries of the right-of-way, or (b) convey the lands, including that portion within the boundaries of the right-of-way, subject to the right-of-way and reserving to the United States the right to enforce all or any of the terms and conditions of the right-of-way, including the right to renew it or extend it upon its termination and to collect rents.

43 U.S.C. § 1768 (1988). Thus, if section 508 of FLPMA applies, BLM has discretion to convey the lands subject to the right-of-way while reserving to itself the right to enforce its terms. This is what Star Lake asserts BLM should have done instead of transferring administration to the Tribe. ^{4/}

In the past, provision for what happened to a right-of-way when the underlying land was transferred out of Federal ownership was made either

^{4/} Again, this issue is distinct from that presented in State of Alaska, supra, which dealt with different statutory language.

in the common law or pursuant to the applicable statute or regulation.

See Swendig v. Washington Water Power Co., 265 U.S. 322, 330 (1924); Energy Transportation Systems, Inc. v. Union Pacific Railroad Co., 453 F. Supp. 313, 317 (D. Wyo. 1977), aff'd, 606 F.2d 934 (10th Cir. 1979); State of Wyoming, 27 IBLA 137, 142-45, 83 I.D. 364, 367-69 (1976), aff'd, State of Wyoming v. Andrus, 436 F. Supp. 933 (D. Wyo. 1977), aff'd, 602 F.2d 1379 (10th Cir. 1979); Godfrey Nordmark, supra at 304-05. More recently, provision for this situation has been made in applicable statutes. 5/ However, we find nothing in section 11 of the Act of December 22, 1974, specifically governing whether a transfer is to be subject to a pre-existing right-of-way or specifying where administration of such a right-of-way will reside following issuance of the patent. 6/ We can only conclude that section 11 of that Act is not inimical to making such a transfer subject to a pre-existing right-of-way or reserving administration of the right-of-way to

5/ That is illustrated by section 14(g) of ANCSA, stating that a transfer will be subject to a pre-existing right-of-way and that, although a transferee will succeed the United States as the grantor under that right-of-way after the land has been conveyed out of Federal ownership, the United States will still retain administration unless it is expressly waived. 43 U.S.C. § 1613(g) (1988).

6/ Although section 11(a) of the Act of Dec. 22, 1974, states that a transfer pursuant to that statutory provision will be "subject to existing leasehold interests" under the Mineral Leasing Act, a right-of-way is not such a leasehold interest. 25 U.S.C. § 640d-10(a) (1988). We do not, however, interpret that language as restricting BLM's authority to make the transfer to the Tribe subject to other non-fee interests such as rights-of-way. Rather, we attribute the narrow reference to "leasehold interests" to the fact that the Act itself refers only to situations where the United States must transfer its interest as a "lessor" of lease interests under the Mineral Leasing Act, in order to emphasize that the transfer to the Tribe would be made subject to any existing leases of those interests. See 51 FR 27468 (July 31, 1986). The Act does not expressly address the status of the transfer of other non-fee interests.

BLM. Moreover, we find nothing in section 11 of the Act of December 22, 1974, precluding the operation of section 508 of FLPMA. The Act is silent as to what happens to rights-of-way on lands transferred to the Tribe.

Section 508 of FLPMA was intended to apply in cases of transfers of land out of Federal ownership pursuant to statutory authority other than FLPMA. The legislative history of that section states that it "does not provide new authority for transfer of * * * lands out of Federal ownership" (S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975)), thus strongly suggesting that it was intended to apply to other statutes providing for such transfers. Moreover, by its very terms, this section applies broadly to all cases involving a transfer of land out of Federal ownership pursuant to any "applicable law." 43 U.S.C. § 1768 (1988). Section 11(a) of the Act of December 22, 1974, 25 U.S.C. § 640d-10(a) (1988), "authorize[s] and direct[s]" the Department 7/ to transfer up to 250,000 acres of land in Arizona and New Mexico under the jurisdiction of BLM to the Tribe, with title to be "taken by the United States in trust for the benefit of the Navajo Tribe as a part of the Navajo Reservation." We are aware of nothing that would remove section 11 of the Act of December 22, 1974, from the term "applicable law" authorizing the "transfer out of Federal ownership [of] any lands covered * * * by a right-of-way" as used in section 508 of FLPMA.

7/ We recognize that the statute actually expressly delegates the authority to the Department. However, the Department has re delegated this authority to authorized officers of BLM. It is hence more accurate to refer to the Department as exercising the authority granted by the statute at issue here.

BLM contends that section 508 of FLPMA only applies where the Department has a choice whether to transfer land out of Federal ownership, focusing on the language therein providing that the Department may convey land subject to a right-of-way "[i]f * * * the Secretary * * * decides to transfer [land] out of Federal ownership" (BLM Answer at 9). BLM states that the Department is bound by section 11 of the Act of December 22, 1974, to convey land which meets the selection criteria and, thus, does not have the choice whether to transfer selected land out of Federal ownership. See 51 FR 27468 (July 31, 1986) (stating that the language of the Act of December 22, 1974, "authorizes and mandates the Secretary of the Interior to transfer qualifying public lands, making this a non-discretionary action").

We can find no basis for limiting the applicability of section 508 of FLPMA to situations where BLM has a choice whether to transfer land out of Federal ownership. The language in section 508 of FLPMA to the effect that it applies where the Department "decides to" effect a transfer does not mean that the Department must have the authority to decide not to transfer at all times until the transfer is effected. The Department, even though charged with the duty to transfer, must still ensure that the requirements of the enabling statute have been met. Thus, the language at issue may simply cover the situation where, as here, the Department has decided that the land qualifies for selection by the Tribe, has been duly selected, and is thus subject to transfer to the Tribe.

BLM's interpretation would rule out the applicability of section 508 of FLPMA in cases where the entrant or claimant has earned the right to a

patent and all that remains is the ministerial act of conveying the land. We do not think that this is what Congress intended when it enacted section 508 of FLPMA. The legislative history of section 508 of FLPMA supports a broad reading of that section, stating that it "covers the various situations that can arise where a tract of land which has a right-of-way on it is conveyed out of Federal ownership." S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975). In addition, the Departmental regulation implementing section 508 of FLPMA, 43 CFR 2803.5(b), which BLM is bound to follow, broadly applies wherever "public lands * * * are transferred out of Federal ownership."

BLM argues that it cannot apply section 508 of FLPMA because section 11 of the Act of December 22, 1974, is special legislation. BLM indicates in its Answer that, in announcing the impending transfer of the subject land to the Tribe in the Federal Register, this fact led it to state therein that the "usual and general requirements of FLPMA * * * did not apply" (Answer at 8-9).

We do not accept BLM's assertion that it stated in the Federal Register that section 508 of FLPMA did not apply. BLM stated as follows in this notice: "Cultural resources will be protected by the Bureau of Indian Affairs who have the same responsibilities as BLM with respect to 36 CFR Part 800. * * * The special legislation that authorizes this selection precludes the need for a planning amendment, environmental analysis and grazing notification requirements." 51 FR 27468 (July 31, 1986). Nothing in the notice expressly indicates that BLM regarded section 508 of

FLPMA as not applicable to the transfer. ^{8/} In any event, we are not persuaded that BLM could avoid its responsibility to comply with section 508 by announcing in the Federal Register that it would not do so. Even assuming that section 11 of the Act of December 22, 1974, is "special legislation," this would not preclude application of section 508 of FLPMA, as that section (as noted above) has a broad application in the case of any transfers out of Federal ownership under "applicable law." 43 U.S.C. § 1768 (1988).

Accordingly, as we can find no evidence that Congress intended to override the dictates of section 508 of FLPMA in the case of transfers pursuant to section 11 of the Act of December 22, 1974, we decline to read that statute as precluding the application of section 508 of FLPMA. See Watt v. Alaska, 451 U.S. 259, 267 (1981). In amending the Act of December 22, 1974, in 1980, Congress expressly exempted transfers of public land pursuant to that statute from only two provisions of FLPMA, not including section 508. See 25 U.S.C. § 640-26(b) (1988). Thus implicitly, section 508 of FLPMA was viewed as applicable. Cf. Santa Fe Pacific Railroad Co., 90 IBLA 200, 216-17 (1986). In the absence of express authority in section 11 of the Act of December 22, 1974, governing whether a transfer pursuant to that statutory provision is to be subject to a pre-existing right-of-way, or any language governing where administration of such a right-of-way is to reside, we must turn to section 508 of FLPMA.

^{8/} The Federal Register notice did reject the need to do a "planning amend-ment." As noted below, the BLM Manual may have allowed BLM to address the question of whether to retain administration through the process of land-use planning. However, this was not the only decisionmaking process available to BLM for review of this question. Thus, BLM's announcement that it would not do a planning amendment cannot be regarded as an announcement that it would not comply with section 508 of FLPMA.

As explained in the legislative history of section 508 of FLPMA, that section was intended to provide the United States with alternatives for protecting its own and the public's interest in existing rights-of-way where the underlying land is conveyed out of Federal ownership:

Normally, under common law, the new landowner becomes the landlord of the lease and assumes the position of the prior landlord, in this case, the United States. This presents few or no problems with roads and other small rights-of-way, but power transmission lines, pipelines, and other large projects are vastly different. In such cases, continued Federal ownership or control may be necessary for environmental, national defense, or a multitude of other reasons. Because the cases will vary with the precise situations involved, the section allows the Secretary to choose the appropriate form of retention or disposal of the right-of-way. (The choices are conveying the land subject to the right-of-way, reserving only the right-of-way, and conveying [all of] the land subject to the right-of-way while reserving the right to enforce terms and conditions for the right-of-way.) [Emphasis supplied.]

S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975).

Under section 508 of FLPMA, the Department must first determine whether "the retention of Federal control over the right-of-way is necessary to assure that the purpose of [Title V of FLPMA] will be carried out, the terms and conditions of the right-of-way complied with, or the lands protected." Right-of-ways for railroads are authorized by Title V, as are such other necessary transportation systems which are in the public interest. 43 U.S.C. §§ 1761(a)(6) and (7) (1988). If the answer is negative, the Department may convey the lands, simply making the conveyance "subject to the right-of-way." If the answer is affirmative, BLM has two options: it may reserve to the United States the lands lying within the

boundaries of the right-of-way, or it may convey the lands, including the lands lying within the boundaries of the right-of-way, but reserving to the United States the right to administer the right-of-way, consisting of the right to enforce all or any of the terms and conditions of the right-of-way, including the right to renew it or extend it upon its termination and to collect rents.

Star Lake argues that BLM failed to fulfill its duty under section 508 of FLPMA by not expressly determining pursuant to appropriate proceedings whether retention of administration of the subject right-of-way is necessary in the public interest. We agree. As Star Lake points out, the procedure specified in the BLM Manual generally tracks this provision. BLM is required to determine whether the public interest will be served by various options, including divesting the United States of right-of-way ownership and administration, retaining the lands covered by the right-of-way in public ownership and administration, and patenting the lands but reserving right-of-way administration to BLM. Reading this provision in connection with the statute, more specific criteria are evident. BLM may divest the United States of both ownership and administration only if it determines that retention of Federal control is not necessary to assure (1) that the purpose of Title V of FLPMA will be carried out, as determined by its judged effect on the public interest, (2) that the terms and conditions of the right-of-way will be complied with, or (3) that the lands will be protected. If any of these three conditions is not met, BLM may not divest the United States of both ownership and administration, as it announced its intention to do in the May 1988 decision.

The BLM Manual in effect in 1987 and 1988 provided that the conveyance of land having an existing right-of-way involved the exercise of discretion by BLM pursuant to section 508 of FLPMA. Section 2801.62 (Rel. 2-229 (June 30, 1986)) provided that, where land is "proposed for patenting," BLM had to determine whether the United States should divest or retain ownership and administration of the land or patent the land and reserve administration. The Manual stated that the preferred alternative was to patent the land "subject to the right-of-way grant, which conveys administration of the grant to the patentee." Id. That is what BLM did here. However, the Manual set forth exceptions to the preferred alternative, including the situation "where the public interest would be best served by retaining right-of-way administration." Id.

The most current BLM Manual prescribes "processes" that determine how the public interest will best be served, including encouraging the parties to reach an independent agreement or patenting the public lands but reserving right-of-way administration to BLM. BLM Manual, Section 2801.62A. (Rel. 2-270 (Nov. 6, 1990)). We find these provisions to be a reasonable interpretation of section 508 and that they should therefore be applied. Where BLM adopts agency-wide procedures in its Manual that are reasonable and consistent with the law, the Board will not hesitate to follow those procedures and require their enforcement. Beard Oil Co., 105 IBLA 285 (1988). Therefore, BLM should have considered whether retaining administration over the right-of-way would serve the public interest.

BLM argues that it was not required by section 508 of FLPMA to determine whether retention of administration was in the public interest because such retention is intended to benefit the United States and the public, but not the right-of-way holder (Answer at 10). It is enough to point out that the record does not show whether BLM determined that retention of administration was in the interest of the United States and the public, if not the right-of-way holder. Further, in this case, Star Lake is proposing to construct a railroad, an endeavor that promises some degree of public benefit. Thus, we are not persuaded that BLM is not obliged to consider whether giving up administration over the lands was not in Star Lake's interests, as any adverse effects on its operations might also indirectly adversely affect the public.

The Tribe argues that, although the transfer document purports to transfer administrative control to it, this was "simply a mistake in draftsmanship," and the transfer was "in effect * * * really a transfer to the Bureau of Indian Affairs, a federal agency." The result, the Tribe contends, is that BLM Manual section 2801.61 (governing transfer of jurisdiction over public lands administered by BLM to another Federal agency) mandates transfer of administrative control. ^{9/}

^{9/} This provision states:

"61 Change in Federal Jurisdiction. If jurisdiction over public land administered by BLM is transferred to another Federal agency and a right-of-way * * * is involved, the authorized officer shall transfer administration of the right-of-way * * * also, unless, as determined by the authorized officer, the transfer would diminish the rights of the holder."
BLM Manual section 2801.61 (Rel. 2-270 (Nov. 6, 1990)).

We are unwilling to attribute the transfer of administration to the Tribe to a mistake in draftsmanship. The simple fact is that BLM's decision does not transfer administration to BIA. Therefore, we are unpersuaded by the Tribe's suggestion that transfer of administration was mandatory. In any event, the most current provisions of BLM Manual section 2801.61 (Rel. 2-270 (Nov. 6, 1990)), expressly provide that BLM has the authority not to transfer administration if doing so would "diminish the rights of the holder." Thus, transfer of administration to BIA is not mandatory, but also requires a reasoned consideration of effects of the transfer by BLM.

Star Lake contends that, prior to the transfer of administration of the subject right-of-way to the Tribe, it was entitled to a formal administrative hearing concerning whether BLM should have retained administration of the right-of-way pursuant to section 506 of FLPMA, 43 U.S.C. § 1766 (1988). That section authorizes the Department to terminate a right-of-way for noncompliance with Title V of FLPMA, Departmental regulations, or the terms and conditions of the right-of-way only "after due notice to the holder of the right-of-way and * * * an appropriate administrative proceeding pursuant to section 554 of Title 5 [of the United States Code]." 43 U.S.C. § 1766 (1988). Thus, termination of a right-of-way must be preceded by a formal administrative hearing. See 43 CFR 2803.4(e); Western Aggregates of Mineral & Rock, Inc., 34 IBLA 164, 166 (1978). According to Star Lake, transfer of administration to the Tribe was tantamount to termination of that right-of-way. See Statement of Reasons at 14-16.

We decline to order such a hearing, as the transfer of administration of the subject right-of-way to the Tribe did not amount to a termination of the right-of-way. Although Star Lake was adversely affected by the transfer of administration to the Tribe, the patent to the Tribe was made subject to the right-of-way. Thus, the right-of-way, with all of its attendant rights, continued even after issuance of the patent. Compare State of Alaska, supra at 272, with The Cities of Aurora & Colorado Springs, Colorado, 18 IBLA 51, 52 (1974).

Star Lake contends that section 508 of FLPMA "recognizes the long established rule that where lands are transferred out of federal ownership subject to an existing right-of-way the Secretary retains administration of the right-of-way even without an express reservation in the patent" (Statement of Reasons at 8 (emphasis added)). While Star Lake cites various cases in support of the "long established rule," it cites no cases directly interpreting section 508 of FLPMA. Our reading of that provision and its legislative history does not support the interpretation advanced by Star Lake.

Rather, we hold that section 508 of FLPMA provides only that the Department "may" first decide whether to convey land subject to a right-of-way. 43 U.S.C. § 1768 (1988). Accordingly, making a transfer subject to a particular right-of-way is not automatic or even mandatory. ^{10/} The

^{10/} By contrast, section 14(g) of ANCSA provides that, upon issuance of a patent pursuant to that statute, "the patent shall contain provisions making it subject to the * * * [existing] right-of-way." 43 U.S.C. § 1613(g) (1988).

legislative history of section 508 acknowledges that the Department may, in the case of "roads and other small rights-of-way," decide not to convey land subject to a pre-existing right-of-way, as would be the case under the common law. S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975).

Section 508 of FLPMA provides that the Department is required either to expressly reserve the land encompassed by the right-of-way or reserve administration of the right-of-way only where it determines that the retention of administration is necessary. Further, the Department has the option to convey land only subject to the right-of-way, without "reserving to the United States the right to enforce all or any of the terms and conditions of the right-of-way." 43 U.S.C. § 1768 (1988); see S. Rep. No. 583, 94th Cong., 1st Sess. 75 (1975). Retention of administration is not automatic, but rather contingent on a finding by the Department. 11/ Therefore, we reject Star Lake's argument that, by conveying land subject to a right-of-way, the Department automatically reserves administration of the right-of-way without the need for an express reservation in the patent. 12/

11/ By contrast, section 14(g) of ANCSA provides that, upon issuance of a patent pursuant to that statute, where the underlying land is subject to a pre-existing right-of-way, "administration of such * * * right-of-way * * * shall continue to be by the * * * United States, unless the agency responsible for administration waives administration." 43 U.S.C. § 1613(g) (1988) (emphasis added). Under this statute, the retention of administration is the automatic result of issuance of a patent unless the United States expressly waives such administration. See State of Alaska, supra at 272 ("[U]pon conveyance of the land * * * [t]he United States retains * * * the right to administer such third-party interests").

12/ This is supported by section 2801.6 of the BLM Manual (Rel. 2-229 (June 30, 1986)), a copy of which is appended to Star Lake's Statement of Reasons and which states that BLM prefers to "patent the public land subject to the right-of-way grant, which conveys administration of the grant to the patentee." (Emphasis added.)

Rather, this question is a matter for the exercise of the Department's discretion. See City of Las Cruces, supra at 51.

There is nothing in the May 1988 BLM decision or elsewhere in the record suggesting that BLM considered whether retention of administration of the subject right-of-way was necessary in the public interest. Rather, it appears that BLM has proceeded as though it lacked jurisdiction to retain administration of the right-of-way because the patent did not expressly retain such authority. By holding that section 508 of FLPMA applies, allowing BLM authority to consider whether administration should be retained, we have necessarily rejected this position.

In the absence of a basis for determining whether BLM properly exercised its discretionary authority under section 508 of FLPMA, it is appropriate to set aside the May 1988 BLM decision and remand the case to BLM for reconsideration of its decision to issue the instant patent only subject to Star Lake's right-of-way. Should BLM conclude that its decision was proper, it should issue a decision setting forth a full explanation for that decision as required by the BLM Manual. That decision will again be subject to appeal to the Board by Star Lake or any adversely affected party.

In view of the apparent absence of any prior BLM determination of whether retention of administration was necessary in the public interest, we need not address other matters raised by the parties at this time.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action as described above.

David L. Hughes
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge